BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SARAH LOTT-EDWARDS Claimant	)	
VS.	)	
AMERICOLD CORPORATION Respondent	)	Docket Nos. 175,770; 175,771; & 223,800
AND	)	
WAUSAU UNDERWRITERS INSURANCE CO., **NATIONAL UNION FIRE INSURANCE CO.,** **TRAVELERS PROPERTY CASUALTY** Insurance Carriers	)	
AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant, respondent and National Union Fire Insurance Company (National Union), and the Kansas Workers Compensation Fund (Fund), all requested Appeals Board review of Administrative Law Judge Robert H. Foerschler's March 16, 1998, Award. The Appeals Board heard oral argument on October 28, 1998, by telephone conference.

APPEARANCES

The claimant appeared by her attorney, Samuel J. Wells of Kansas City, Kansas. Respondent and its insurance carrier, Wausau Underwriters Insurance Company, appeared by their attorney, David J. Bogdan of Overland Park, Kansas. Respondent and

its insurance carrier, National Union Fire Insurance Company, appeared by their attorney, John B. Rathmel of Overland Park, Kansas. The respondent and its insurance carrier, Travelers Property Casualty, appeared by their attorney, Robert D. Benham of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Marc K. Erickson of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

Docket No. 175,770

Claimant's Application for Hearing in this docket number was filed on March 22, 1993, and alleged a date of accident of August 5, 1989. The Administrative Law Judge denied claimant's claim for this accident finding claimant failed to serve a timely written claim for compensation upon the respondent as required by K.S.A. 44-520a (Ensley). The claimant, in her application for review before the Appeals Board, requested the Appeals Board to review that finding. However, at oral argument, the claimant abandoned her request for review of this docket number. Therefore, the Administrative Law Judge's denial of benefits for the August 5, 1989, accident remains in full force and effect.

Docket No. 175,771

Claimant's Application for Hearing in this docket number was also filed on March 22, 1993, and alleged a date of accident of June 15, 1992. The Administrative Law Judge found claimant sustained an accidental injury while employed by the respondent on June 19, 1992, the first date that claimant was seen by a physician for symptoms that worsened while at work on June 15, 1992. As a result of this work-related accident, the Administrative Law Judge awarded claimant permanent partial general disability benefits based on a 25 percent functional impairment rating. The Administrative Law Judge ordered respondent's insurance carrier, National Union, to pay 60 percent of the Award and the Fund to pay 40 percent of the Award.

National Union appealed and contends that claimant's appropriate date of accident is February 23, 1994, the first date claimant was taken off work for her first carpal tunnel release surgery. National Union argues there is no evidence in the record that claimant

was injured on June 19, 1992, the date the Administrative Law Judge found as claimant's appropriate date of accident. National Union also contends, even if February 23, 1994, is found to be claimant's appropriate accident date, the claimant has the burden to prove National Union was respondent's insurance carrier on that date and has failed to do so. Furthermore, National Union argues, if either June 19, 1992, or February 23, 1994, are found to be claimant's appropriate date of accident, it has no liability because the record proves the Fund is 100 percent responsible for the Award.

The Fund contends there is no evidence in the record to either support the Administrative Law Judge's finding that the Fund was liable for 40 percent of the Award or National Union's contention that the Fund is liable for 100 percent of the Award.

Late in the trial of this case, after a hearing on claimant's motion, the Administrative Law Judge granted claimant's request to amend her Application for Hearing to allege a third date of accident.

Claimant's date (or dates) of accident were never agreed upon. Instead, date of accident was an issue throughout the litigation of these docketed claims, also, nature and extent of claimant's disability remains an issue to be determined by the Appeals Board.

Docket No. 223,800

On June 26, 1997, claimant filed another Application for Hearing alleging an accident on March 1, 1995, and Travelers Property Casualty (Travelers) was added as respondent's insurance carrier for that date.

The Administrative Law Judge found claimant had failed to prove she sustained an accidental injury on March 1, 1995, and further found that claimant failed to prove she served upon respondent a timely written claim for compensation.

The claimant, on the other hand, contends respondent cannot now assert the written claim defense because written claim was satisfied by claimant when she filed her Application for Hearing on March 22, 1993, alleging a date of accident of June 15, 1992, for the same injuries caused by repetitive use work activities while employed by the respondent. Further, claimant argues the record proves her preexisting cervical condition and bilateral upper extremity injuries were aggravated and worsened by her work activities from June 15, 1992, until March 10, 1995, the last day she worked before leaving work because of her injuries. Therefore, nature and extent of claimant's disability for this period of accident remains an issue for review.

Travelers was respondent's insurance carrier for claimant's alleged March 1, 1995, accident. Travelers requests the Appeals Board to affirm the Administrative Law Judge's finding that claimant failed to prove she sustained additional injury through March 1, 1995, and that she further failed to serve a timely written claim on respondent for the March 1, 1995, accident.

The Fund agrees with the claimant and contends the appropriate date of accident in this case for claimant's repetitive trauma injuries is March 10, 1995, the last day claimant worked before leaving work because of her injuries. Accordingly, the Fund contends it has no liability in this case for a March 10, 1995, accident as K.S.A. 44-566a(e)(1) and K.S.A. 44-567(a)(1) have eliminated Fund liability for all accidents occurring on or after July 1, 1994.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Findings of Fact

(1) Respondent operates an underground storage facility for storage of packaged food in Kansas City, Kansas.

(2) Claimant was employed by respondent as a warehouse or order filling person from April 1986 through March 10, 1995, which was her last day worked.

(3) Claimant's job duties required her to repetitively use her upper extremities lifting heavy packaged food items, some weighing up to 75 pounds, stacking those heavy items on pallets at an overhead height, lifting and stacking wooden pallets, and operating a forklift to unload and store full and empty wooden pallets. At least a portion of her job duties were performed in a storage area for frozen food products in below freezing temperatures.

(4) On or about August 4, 1989, claimant was repetitively lifting 75 pound cases of butter onto pallets which required her to stack some cases at a height over her head. Claimant had severe pain and discomfort while performing this work activity which she described encompassing from her swollen fingers to her neck. Claimant reported her problems and difficulty in performing her job duties to the respondent.

(5) Respondent initially provided claimant with medical treatment through Business and Industry Health Group in Overland Park, Kansas. Claimant also underwent a nerve conductive test that showed mild to moderately severe median neuropathy at the wrists bilaterally or carpal tunnel syndrome.

Claimant was eventually referred to Fred M. Wood, M.D., an orthopedic surgeon, who additionally diagnosed claimant with cervical arthritis and cervical radiculopathy.

(6) Claimant was taken off work for six weeks and was treated conservatively with medication and physical therapy.

(7) When claimant returned to work, she was delegated for a short period of time to light work of repackaging and sweeping. Commencing in 1990, the job changed to a forklift driver. However, in addition to the forklift driving duties, at least a portion of the work day, claimant was required to perform the repetitive heavy lifting of food products and pallets.

(8) Claimant continued to take pain medication because she continued to have pain and discomfort while performing the repetitive lifting work activities.

(9) On or about June 15, 1992, claimant's symptoms worsened to the point she again notified respondent. Respondent sent her to Business and Industry Health Group, who referred claimant to orthopedic surgeon Lanny W. Harris, M.D.

(10) While claimant was under Dr. Harris' treatment, she remained working and received conservative treatment until February 1994.

On February 23, 1994, Dr. Harris performed a right carpal tunnel release and on April 13, 1994, a left carpal tunnel release. Claimant was returned to her regular forklift driving and heavy labor job in June of 1994.

(11) After only a week of working, claimant's symptoms returned and she again had to take pain medication in order to get through the work day.

(12) Finally, on March 10, 1995, claimant's pain, discomfort, and swelling of her arms and hands reached the point she could no longer perform her job duties. This time claimant was referred by respondent to neurosurgeon Robert T. Tenny, M.D., in Shawnee Mission, Kansas.

(13) Dr. Tenny had claimant undergo a cervical myelography and a post-myelographic CT scan which showed significant cervical spondylitic disease. Nerve conductive tests indicated reoccurrence of bilateral carpal tunnel syndrome. Dr. Tenny performed a left carpal tunnel release on May 8, 1995, and a right carpal tunnel release on June 19, 1995.

(14) After completing an extensive program of physical therapy and a work-hardening program, Dr. Tenny released claimant to return to work on September 20, 1995, with permanent restrictions of no repetitive neck or shoulder movement, no repetitive hand movement, lifting limited to 5 pounds per hand, and no fine hand manipulation.

On August 29, 1995, the doctor also prescribed for claimant to wear a soft cervical collar for 12 months for treatment of her cervical arthritis.

(15) Respondent was unable to return claimant to work with those restrictions. Respondent referred claimant for a vocational rehabilitation assessment which included vocational testing. Claimant was found to perform at a less than an adequate academic level. The result of the vocational testing indicated claimant was not a candidate for further academic training and was not a candidate to return to work. It was noted that claimant had a difficult time during the testing procedure of holding the pencil to complete the test.

(16) Orthopedic surgeon Edward J. Prostic, M.D., was the only physician to testify in this case. At claimant's attorney's request, he saw claimant once on June 25, 1996. At the time of the examination, Dr. Prostic had the benefit of claimant's previous medical treatment records including the various imaging and other diagnostic tests performed on claimant. The doctor took a history from claimant and conducted a physical examination. He found claimant's complaints of pain in the base of her upper neck, posteriorly with radiation up her neck, across her shoulders, and down her mid back. At times she had pain in her upper arms, hands, and wrists. Claimant also demonstrated that she had poor grip and intermittent numbness of both hands.

(17) Dr. Prostic found claimant had sustained injuries to her cervical spine and both hands while performing repetitive forceful work activities for respondent. He diagnosed claimant with significant cervical degenerative disc disease and post bilateral carpal tunnel release surgeries on two occasions. The doctor rated claimant's permanent impairment of function at 25 percent of the body as a whole. He restricted claimant's work activities to no repetitive forceful gripping with either hand, minimum use of the wrist in the flexed position, and no use of her neck significantly away from the neutral position.

(18) Dr. Prostic opined claimant originally injured her neck and hands in 1989 and aggravated the neck and hands as she continued to lift and grip at work. He believed

claimant had a worsening of those conditions in 1992. The doctor did not have enough information available to answer the question of whether claimant suffered a subsequent aggravation in 1995.

(19) However, Dr. Prostic was asked to assume that after claimant's 1994 carpal tunnel release surgeries, she returned to work and her symptoms worsened until she could no longer perform her job duties in March of 1995. Based on that assumption, Dr. Prostic opined that claimant sustained a subsequent aggravation of her underlying disease from 1994 until she had to quit work in March of 1995.

(20) Dr. Prostic was unable to apportion the 25 percent functional impairment rating to either the 1989, 1992, or 1995 accidents. He went on to opine that claimant was a surgical candidate for treatment of the degenerative disc disease in her neck.

(21) Michael J. Dreiling, a vocational expert, was employed by the claimant to assess the impact claimant's work-related injuries had on her vocational capabilities. Mr. Dreiling personally interviewed claimant on August 9, 1996.

Mr. Dreiling reviewed claimant's past work history, educational background, medical restrictions, results of vocational testing, and the results of both private and state vocation rehabilitation services efforts to return claimant to work.

Claimant was not employed at the time of this vocational assessment and had not worked since March 10, 1995, the last day she worked for the respondent where she worked full-time and earned $13.30 per hour. In fact, claimant was not employed on October 29, 1997, the last time she testified in this case and she also testified she had not looked for employment.

Taking into consideration claimant's medical restrictions of limited use of her hands for work tasks and the difficulty of moving her neck, coupled with her minimal transferrable vocational skills, Mr. Dreiling concluded claimant was not a candidate to return to work in the open labor market. He also opined, since she did not have the capability to return to work, she had a 100 percent wage earning capacity loss.

(22) No physician expressed an opinion on what effect claimant's work-related injuries had on her work task performing ability in jobs she had performed in the 15 years preceding her accident date.

(23) At the regular hearing, claimant requested payment of unpaid medical expenses from Bethany Medical Center in the amount of $3,187.95 which were associated with the

1994 carpal tunnel release surgeries and a $1,866.49 medical bill from Shawnee Mission Medical Center associated with the 1995 carpal tunnel release surgeries.

Conclusions of Law

(1) The date of accident, in a carpal tunnel syndrome action, is the last day claimant worked for the employer and was required to stop working because of the pain and disability resulting from the injury. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). The rule in Berry was expanded to apply to other repetitive trauma injuries other than carpal tunnel syndrome by Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

(2) The Appeals Board concludes the appropriate date of accident in this case was March 10, 1995, claimant's last day worked. The Appeals Board finds the evidence established that March 10, 1995, was claimant's last day worked instead of March 1, 1995, as contained in claimant's Application for Hearing. In 1992, claimant's symptoms accelerated to the point she reported them to the respondent. Respondent referred claimant for medical treatment. However, claimant remained working on her regular job until February 23, 1994, when she was taken off work for bilateral carpal tunnel surgeries.

Claimant returned to her regular work in June 1994 and after working for a week, again started to have increased symptoms. Despite suffering the increased symptoms, claimant missed no time from work until March 10, 1995. On that date, claimant was forced to quit work because of her injuries. Thereafter, claimant, in May and June 1995, had bilateral carpal tunnel release surgeries.

The Appeals Board is mindful that claimant was taken off work in 1994 for carpal tunnel release surgeries and missed work during that time. However, at that time, claimant's injuries were caused by her repetitive work activities and she was returned to essentially those same repetitive work activities which again aggravated and worsened her injuries to the point on March 10, 1995, she could no longer work. The evidence in the record also does not permit the separation of the injuries from June 1992 through March 10, 1995. Therefore, the Appeals Board concludes the evidence in the record does not adapt to the assignment of a date of accident to any specific event because the injuries occurred over a period of time. *See* Depew v. NCR Engineering & Mfg., 263 Kan. 15, 947 P.2d 1 (1997). Accordingly, the Appeals Board concludes claimant's last day worked is the most appropriate date to use to determine what law applies and when permanent disability benefits begin.

(3) As previously noted, claimant requested and was granted leave to amend her Application for Hearing to allow a third accident date of March 1, 1995. Claimant did so by filing another application for hearing on June 26, 1997, which was assigned Docket No. 223,800. Accordingly, the Appeals Board concludes Docket No. 175,771 was amended and was merged with Docket No. 223,800 to include a March 1, 1995, accident date.

The Appeals Board concludes claimant's timely written claim requirements were previously satisfied when claimant filed her Application for Hearing on March 22, 1993, that alleged an accident date of June 15, 1992, and was assigned Docket No. 175,771. That application also alleged repetitive use injuries to claimant's right and left upper extremity and back. Therefore, since Docket No. 175,771 was amended and was merged with Docket No. 223,800, the claimant has met the timely written claim requirement.

(4) A work-related injured employee is entitled to permanent total disability benefits in the total amount of $125,000 if the evidence proves the employee's work-related injuries have rendered the employee completely and permanently incapable of engaging in any type of substantial and gainful employment. *See* K.S.A. 44-510c(2) and K.S.A. 44-510f(a)(1).

(5) The Administrative Law Judge concluded claimant was not entitled to a work disability because there was no medical reason for her to leave her employment on March 10, 1995.

The Appeals Board disagrees with the Administrative Law Judge. After Dr. Prostic was presented with the fact that claimant had to leave her employment on March 10, 1995, because of the increasing pain and discomfort, he testified claimant's work activities aggravated the underlying disease. The Appeals Board concludes this opinion, coupled with the fact claimant again had to undergo bilateral carpal tunnel release surgeries after she left work proved claimant's repetitive work activities permanently aggravated her neck and hand injuries causing her to leave work.

(6) However, the Appeals Board concludes the testimony of vocational expert Michael Dreiling established that claimant does not possess the ability to work. That opinion was uncontradicted. Accordingly, the Appeals Board concludes that claimant is realistically unemployable and is therefore entitled to a permanent total disability award as provided for in K.S.A. 44-510f(a)(1). *See* Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

Any argument that claimant is somehow precluded form receiving a permanent total disability award because she did not specifically request it is unfounded. The nature and extent of claimant's disability has been at issue throughout the trial of this claim and nature and extent is all encompassing; it includes whether claimant's disability is total or partial, permanent or temporary, functional or work, and even whether claimant has any disability at all. Also, the nature and extent issue was never limited by any stipulation of the parties. Respondent cannot argue surprise or prejudice. Claimant testified she cannot work and her vocational expert agreed that claimant is realistically unemployable. Respondent then had an opportunity to rebut this evidence. Even though claimant argued she had proven a 100 percent work disability rather than a permanent total disability, what evidence would respondent have offered to rebut a claim for a permanent total disability that it would not also offer to defend a claim for a 100 percent work disability? We cannot think of any. Thus, even though claimant may never have alleged a permanent total disability in her submission letter to the Administrative Law Judge or in her brief to the Appeals Board, she is not required to do so. Nature and extent of disability is the issue, and the Appeals Board's determination of that issue must be based upon what the evidence in the record establishes.

(7) The respondent timely objected to the admissibility of vocational expert Michael Dreiling's opinions on claimant's ability to find work and capacity to earn wages. The basis of the objection was insufficient foundation because the opinions were predicated upon restrictions contained in medical reports of nontestifying physicians. *See* Roberts v. J. C. Penney Co., 263 Kan. 270, Syl. ¶ 5, 949 P.2d 613 (1997).

Michael Dreiling based his opinions on claimant's ability to find work and capacity to earn wages using the restrictions of Edward J. Prostic, M.D., who testified and Robert T. Tenny, M.D., who did not testify. Mr. Dreiling testified the restrictions he used to form his opinions were claimant's limited use of her hands to perform work tasks and her difficulty of moving her neck. Those were the restrictions imposed by Dr. Prostic.

The Appeals Board concludes Mr. Dreiling's opinions were based on Dr. Prostic's opinions, and therefore, this is sufficient foundation for Mr. Dreiling's opinions to be admitted as competent evidence.

(8) The Fund has no liability in this case because claimant's date of accident is March 10, 1995, and the Fund was absolved of all liability for work-related accidents occurring on or after July 1, 1994. *See* K.S.A. 44-566a(e)(1) and K.S.A. 44-567(a)(1) and Shain v. Boeing Military Airplanes, 22 Kan. App. 2d 913, 924 P.2d 1280 (1996).

(9) Vocational expert Michael Dreiling's August 9, 1996, report indicated claimant was working full time earning $13.30 per hour when she left her employment on March 10, 1995. The Appeals Board concludes claimant's average weekly wage was $532 per week as of the March 10, 1995, accident date.

(10) The parties stipulated that claimant was paid temporary total disability compensation, pursuant to a preliminary hearing order, for 61 2/9 weeks at $289 per week for a total of $17,708[1]. National Union paid on behalf of the respondent the $17,708 amount of temporary total disability compensation and also paid medical expenses in the amount of $30,000. The record, however, does not indicate the dates the weeks of temporary total disability compensation were paid, or the dates the medical treatment was incurred.

Therefore, the Appeals Board concludes, since it found that claimant suffered injuries over a period of time from June 1992 culminating on claimant's last day worked of March 10, 1995, and since the evidence does not establish the dates temporary total disability compensation was either paid or the date claimant was temporarily disabled, then the temporary total disability compensation paid should be included in the computation of the Award at the $289 weekly compensation rate.

(11) The Appeals Board concludes, since it found claimant suffered from repetitive injuries over a period of time from June 1992 and culminating on claimant's last day of work on March 10, 1995, National Union should be responsible for the temporary total disability compensation and medical expenses incurred during its period of coverage. Travelers then should be responsible for all temporary total disability compensation and authorized medical treatment incurred during its period of coverage plus permanent total disability compensation and any other benefits owed after March 10, 1995. Accordingly, Travelers should reimburse National Union for any temporary total disability compensation and medical treatment incurred and paid by National Union after Traveler's coverage commenced. *See* Kimber v. U.S.D. No. 418, 24 Kan. App. 2d 280, 283, 944 P.2d 169, *rev. denied* _____ Kan. _____ (1997).

The Appeals Board acknowledges Kimber also held that the non-liable employer that paid compensation benefits before the date of accident could seek reimbursement for such excess payment from the Workers Compensation Fund pursuant to K.S.A. 44-534a(b). 24 Kan. App. 2d at 283. However, Kimber involved two separate employers with one date of accident as opposed to this case where there is only one employer involved with a series of accidents culminating on the last day claimant worked. The Appeals Board

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[1] 61 2/9 x $289 = $17,692.58 but the stipulated total amount paid is $17,708.

concludes Kimber does not apply when there are repetitive trauma injuries which are sustained by a series of accidents over a period of time. To hold otherwise would require a subsequent insurance carrier to pay benefits that were incurred long before that carrier began its coverage. The Appeals Board concludes National Union should remain responsible for temporary total disability benefits and medical expenses incurred for the repetitive trauma injuries claimant sustained over the period of accident during its period of coverage. Finding otherwise would jeopardize the prompt payment of temporary total disability and medical benefits in repetitive trauma cases until claimant left work or permanent restrictions were implemented as a result of the injuries. *See* Alberty v. Excel Corp., 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. _____ (1998); Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995); Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). The Berry and Condon line of cases do not mean an injured worker can not have a need for workers compensation benefits before the "date of accident." Last date worked is a legal fiction to fix a date for the assessment of permanent disability benefits. It must not be lost sight of that repetitive trauma cases are a series of accidents, not a single accident.

(12) Counsel for respondent and National Union argued the only date it stipulated it was respondent's workers compensation carrier was claimant's alleged June 15, 1992, accident date. If any other accident date was found, National Union argued it had no liability because the claimant had the burden to prove coverage and failed to do so.

The Appeals Board concludes the claimant does not have the burden to prove what insurance carrier has respondent's workers compensation insurance coverage on any given date. Claimant has the burden to prove his right to an award of compensation and to prove the various conditions on what his or her right depends against the employer only. *See* K.S.A. 44-501(a) and Helms v. Pendergast, 21 Kan. App. 2d 303, Syl. ¶ 5, 899 P.2d 501 (1995).

The employer has the responsibility to obtain insurance, qualify as a self-insured, or maintain membership in a qualified group-funded pool to secure payment of workers compensation benefits. *See* K.S.A. 44-532(b). Failure of the employer's insurance carrier to pay benefits awarded when due subjects the insurance carrier to penalties as provided for in K.S.A. 44-512a. Also, if an insurance carrier unreasonably denies insurance coverage or refuses to pay compensation due or awarded, it may be subject to certain penalties and sanctions contained in the fraud and abuse statute found at K.S.A. 44-5,120 *et seq.*

(13) The claimant requested the payment of unpaid medical expenses from Bethany Medical Center of $3,187.95 associated with the 1994 carpal tunnel release surgeries and

$1,866.49 from Shawnee Mission Medical Center associated with the 1995 carpal tunnel release surgeries. The Appeals Board concludes there was no objection to these medical expenses at the time of the request. Thus, the Appeals Board orders the respondent to pay the medical expenses as authorized medical upon proper presentation of the medical bills.

(14) Claimant is entitled to future medical treatment upon proper application and approval by the Director.

(15) Claimant is entitled to an unauthorized medical allowance at the statutory maximum in the amount of $500.

AWARD

Docket No. 175,770

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated March 16, 1998, remains in full force and effect because claimant, before the Appeals Board, abandoned her request for review of this docket number.

AWARD

Docket Nos. 223,800 and 175,771

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated March 16, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sarah Lott Edwards, and against the respondent, Americold Corporation, and its insurance carrier, National Union Fire Insurance Co.[2]; and its insurance carrier, Traveler Property Casualty; for an accidental injury sustained on March 10, 1995, and based upon an average weekly wage of $532.

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[2] National Union Fire Insurance Company's liability is limited to authorized medical expenses and temporary total disability compensation as specified in Conclusion of Law No. 11.

Claimant is entitled to 61.22 weeks of temporary total disability compensation at the rate of $289 per week or $17,692.58, followed by 336 weeks at the rate of $319 per week or $107,184 followed by one week at $123.42 per week, for a permanent total disability award of $125,000.

As of December 28, 1998, there is due and owing claimant 61.22 weeks of temporary total disability compensation at the rate of $289 per week or $17,692.58, followed by 137.21 weeks of permanent total compensation at the rate of $319 per week in the sum of $43,769.99 for a total of $61,462.57, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $63,537.43 is to be paid for 199 weeks at the rate of $319 per week, and one week at the rate of $56.43 per week, until fully paid or further order of the Director.

Claimant is entitled to unauthorized medical expense up to the statutory maximum of $500.

Claimant is entitled to future medical treatment upon proper application and approval by the Director.

All authorized medical expenses are ordered paid by the claimant including the unpaid medical bills to Bethany Medical Center in the amount of $3,187.95 and to Shawnee Mission Medical Center in the amount of $1,866.49.

The Kansas Workers Compensation Fund is not liable for any portion of the Award.

The cost of the transcripts and the record are taxed against the respondent and its insurance carrier as follows:

Hostetler & Associates, Inc.	$ 674.49
Metropolitan Court Reporters, Inc.	$1,122.57
Richard Kupper & Associates, Inc.	$1,405.95

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

Although I agree that claimant is entitled to an award for permanent total disability benefits, I disagree with determining the respective liability of the insurance carriers.

Although there are limited exceptions, the Kansas Supreme Court has long held that the Division does not have the authority or jurisdiction to determine the comparative or respective liability of two or more insurance carriers. Disputes between carriers concerning their respective liabilities for compensation awarded to an injured worker should not be litigated in the proceeding before the Division but in separate proceedings brought in District Court.[3]

First, the Division has no jurisdiction beyond that specifically provided by the Workers Compensation Act.[4] And the Act does not give the Division the authority to determine and fix the comparative degrees of liability between carriers.

Second, when apportioning liability between insurance carriers, contractual considerations and equitable considerations may well be involved that are of no concern to the injured worker. Deciding apportionment issues in proceedings for benefits would only serve to impede expeditious awards, which is the stated primary purpose of the act.[5]

The Appeals Board has erred as the award should be entered against the respondent and its insurance carriers without apportioning liability.

BOARD MEMBER

[3] Kuhn v. Grant County, 201 Kan. 163, 439 P.2d 155 (1968); Hobelman v. Krebs Construction Co., 188 Kan. 825, 366 P.2 270 (1961).

[4] Hobelman, p. 830

[5] Hobelman, p. 831

DISSENT

The undersigned respectfully dissents from the majority's opinion in this matter. In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 44-501, K.S.A. 44-508(g); Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In this matter, claimant originally alleged accidental injury on August 5, 1989, and on June 15, 1992. Applications for Hearing were filed for both of these accidents on March 22, 1993. At the motion hearing on June 12, 1997, claimant moved to amend her Application for Hearing alleging a third date of accident of March 1, 1995. An Application for Hearing was filed for this date of accident on June 26, 1997. At no time during the litigation of this matter did claimant request approval to amend her applications to allege a series of accidents from any of the three above accidents. In the majority opinion, claimant is granted an award based upon a series of traumas through March 10, 1995, claimant's last day of work before leaving because of her injuries. Neither this final date of accident nor a series of micro-trauma accidents were ever alleged by claimant.

Claimant argues an inability to perform any work after the accident. Claimant 's argument appears to beg a finding of permanent total disability compensation. However, at no time did claimant ever request an award of permanent total disability. On several occasions, claimant's attorney was asked if this was a permanent total case. Claimant's attorney rejected this suggestion, arguing entitlement to a 100 percent permanent partial disability award. There is a substantially different standard for permanent partial disability versus permanent total disability. In order for a party to properly litigate an issue, it must be apprised of the claim being raised. In this instance, claimant not only failed to raise the issue of permanent total disability compensation, but when questioned, adamantly denied permanent total disability was an issue.

The Appeals Board, as the trier of facts, has the responsibility of making its own determination on the issues presented, based upon the testimony of the claimant and any other testimony which may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). It is not the Appeals Board's responsibility to litigate workers compensation injuries for the parties or to create issues which have not been raised. It is also not the Appeals Board's responsibility to fill in the blanks created by less than adequate representation.

In this instance, claimant has alleged specific dates of accident with specific traumas. Claimant has not alleged a series of micro-trauma injuries as was awarded. In

addition, claimant has not only failed to argue her entitlement to permanent total disability but has adamantly rejected that as an issue in this dispute.

This Appeals Board Member would find that claimant has alleged three specific dates of accident and has failed to allege or prove a series of accidental injuries through her last day worked. Claimant should be denied an award under Docket No. 175,770 for having failed to serve a timely written claim for compensation upon respondent as required by K.S.A. 44-520a (Ensley). Claimant should be granted an award for permanent partial disability rather than permanent total disability under Docket No. 175,771 for the June 15, 1992, date of accident. Finally, claimant should be denied an award under Docket No. 223,800 for having failed to file an Application for Hearing in a timely fashion under K.S.A. 44-520a for the March 1, 1995, accident.

BOARD MEMBER

DISSENT

The undersigned Appeals Board Member also respectfully dissents from the majority's opinion in this case. The majority found claimant was permanently and totally disabled as defined in K.S.A. 44-510c(a)(2). Claimant was therefore awarded permanent total disability compensation benefits in the maximum amount of $125,000, as provided for in K.S.A. 44-510f(a)(1).

The record, however, does not contain an allegation that claimant is permanently and totally disabled. Claimant did allege and argue that she sought permanent partial disability benefits, depending on the accident date, as defined in either K.S.A. 1991 Supp. 44-510e(a) or K.S.A. 44-510e(a). During stipulations taken before the regular hearing held on August 19, 1997, claimant requested work disability benefits for the March 10, 1995, date of accident. In both claimant's submittal letter to the Administrative Law Judge dated December 15, 1997, and claimant's brief to the Appeals Board filed April 28, 1998, claimant claimed she had proven a work disability in the amount of 100 percent and requested permanent partial general disability benefits based on a 100 percent work disability.

Permanent partial general disability exists when an employee is disabled in a manner which is partial in character and permanent in quality. For accidents occurring before July 1, 1993, the extent of permanent partial general disability was expressed, as a percentage, to which the employee's ability to perform work in the open labor market and

to earn a comparable wage had been reduced. *See* K.S.A. 1991 Supp. 44-510e(a). On or after July 1, 1993, the extent of permanent partial general disability is expressed, as a percentage, in the opinion of the physician, that the employee has lost the ability to perform work tasks the employee performed during the 15-year period next preceding the accident, averaged together with the difference between the claimant's pre-injury and post-injury wage. *See* K.S.A. 44-510e(a).

On the other hand, permanent total disability exists when an employee has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. *See* K.S.A. 44-510c(a)(2).

The Appeals Board has consistently taken the position that an issue not raised before the administrative law judge can not, for the first time, be raised on appeal before the Appeals Board. *See* McLinn v. Commercial Sound Company, Docket No. 173,709 (October 1997) and Gutierrez v. The Boeing Company - Wichita, Docket No. 176,845 (May 1996). In McLinn, the Appeals Board found the respondent failed to raise before the administrative law judge the issue that claimant's award should be limited only to medical benefits because claimant was not disabled from work for one week from earning full wages as required by K.S.A. 44-501(c) and as interpreted by Boucher v. Peerless Products, Inc. 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996). The Appeals Board concluded that issue was not properly before the Appeals Board because it was not raised before the administrative law judge and claimant was not placed on notice of his need to present evidence addressing that issue.

This Appeals Board Member is mindful that nature and extent of claimant's disability was an issue before the Administrative Law Judge in all three docket numbers that noted three separate dates of accident. However, it is this Appeals Board Member's opinion that the claimant is required to identify, before the administrative law judge, whether he or she is seeking permanent total disability benefits as opposed to permanent partial general disability benefits. As set forth above, these terms are defined differently in the Workers Compensation Act and, therefore, each element of the disability definitions requires a different standard of proof. Accordingly, because claimant never alleged she was permanently and totally disabled as a result of her work-related injuries, the respondent never had notice she was seeking such benefits and consequently, never had the opportunity to present evidence in an effort to defend the allegation.

The legislature has specifically set out in K.S.A. 44-501(g) "that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both." However, the statute goes on to state "[t]he provisions of the

workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder." *See also* Miner v. M. Bruenger & Co., 17 Kan. App. 2d 185, Syl. ¶ 5, 836 P.2d 19 (1992). Here, it is this Board Member's opinion that the majority did not apply the Act impartially to both employers and employees. By awarding the claimant permanent total disability benefits not requested, it is this Appeals Board Member's opinion that the majority has construed the facts not impartially, but liberally, in favor of the employee.

This Appeals Board Member would find that claimant has proven only a work disability in the amount of 50 percent. For the March 10, 1995, accident date, claimant has proven she does not have the capacity to earn a wage and therefore she has a 100 percent wage loss. However, claimant failed to prove a loss of work task performing ability because no physician testified as to such loss. Therefore, averaging a 0 percent loss of work task performing ability with a 100 percent wage loss entitles claimant to a 50 percent work disability. The policy considerations as set forth in Copeland do not apply because the uncontradicted evidence established claimant does not have the capacity to earn a wage in the open labor market.

One Appeals Board Member of the majority has dissented to the portion of the Award that deals with insurance coverage and reimbursement of workers compensation benefits paid by an insurance carrier during a period of accident before an injured worker's last day worked. This Appeals Board Member's dissent only applies to the portion of the Award entitling claimant to permanent total disability benefits. I agree with the Award as it pertains to insurance coverage and reimbursement of certain benefits paid by insurance carriers.

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